No. 5280

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PARAMOUNT MOTORS CORPORATION OF THE PACIFIC, a corporation,

Appellant and Petitioner,

vs.

TITLE GUARANTEE & TRUST CO., a corporation; THE MORTGAGE CORPORATION OF AMERICA, a corporation, and THERON WALKER, styling himself and doing business as THERON WALKER ENGINEERING & CONSTRUCTION COMPANY,

Appellees and Respondents.

PETITION OF APPELLANT FOR REHEARING

Carsie A. Roberts,

Maynard F. Stiles,

407 Law Building,

139 North Broadway

Los Angeles, California,

Attorneys for Appellant and Petitioner.

Los Angeles Daily Journal—Law Printers—121 Court Street, Los Angeles, Cal.

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PETITION OF APPELLANT FOR REHEARING.

To the Honorable Judges of said Court:

The appellant above named, feeling aggrieved by the decision and opinion of this honorable court, affirming the decree of the court below, respectfully petitions your Honors to grant your petitioner a rehearing and reconsideration of said cause; for these reasons:

I. The court appears to have overlooked or to have attached insufficient importance to certain facts connected

with the transaction concerning the $11,965.00 account, assigned by the complainant to Theron Walker, and by him assigned to defendant, Mortgage Corporation of America, resulting, as your petitioner respectfully urges, in an erroneous affirmance of the finding of the district court that the assignment was only as security for the notes that were already secured by trust deeds, and not as payment thereon.

II. Walker, having accepted the assignment, whether as payment or as security, and his assignee having collected and applied for his benefit a large portion of the money assigned, equity would seem to require that some accounting should be had of the residue, there still being cash on hand in the fund, before a sale of the land should be permitted to enforce payment of a sum *in excess of the total original demand.*

III. The complainant prayed an accounting to determine the state of the indebtedness and offered to pay whatever sum should be found justly owing. After the filing of the amended bill but before the hearing, the defendants began pyramiding arbitrary demands against complainant, which were brought to the court's attention at the trial but ignored by the court as not in issue. An accounting of what was justly due and for which a sale of the land was permissible would have considered and would have excluded the $2,579.43 item, added after the first dismissal of the bill herein, and would have prevented the making of the subsequent like additions; but if this matter was not deemed to be within the purview of the pleadings, the court should have entertained the amended and supplemental bill, complaining of this addi-

tional demand, as an effort to resist the enforcement of an extortionate exaction, not as an "attempt to delay the collection of a just debt."

IV. When this court restrained foreclosure proceedings on the trust deed, pending appeal, it required the appellant to give a bond with the condition that, upon affirmance of the decree appealed from, appellant would pay to the appellees $2,500.00, to be "applied on the indebtedness of appellant to appellee, Mortgage Corporation of America." The affirmance of the decree now makes that payment obligatory, but insures no relief to appellant; for the amount of the indebtedness is not ascertained, and no provision is anywhere made for fixing it, or preventing appellees from arbitrarily augmenting their former demands, as they have heretofore done.

WHEREFORE, your petitioner respectfully prays that a rehearing of this cause be had and that the decree appealed from be re-examined and reversed.

PARAMOUNT MOTORS CORPORATION
OF THE PACIFIC,

By Counsel.

CAESAR A. ROBERTS,
MAYNARD F. STILES,
Solicitors.

We, the undersigned counsel of record for the above named petitioner, hereby certify that in our opinion the foregoing petition for a rehearing of the above entitled

cause is well founded and that the petition is not interposed for purposes of delay.

CAESAR A. ROBERTS,
MAYNARD F. STILES.

ARGUMENT IN SUPPORT OF PETITION.

In asking a rehearing, counsel are embarrassed by the consciousness that they may not have given the court all the help they might have given.

The court below dismissed complainant's bill on motion for want of equity on its face, and in reversing that dismissal this court said (15 Fed. (2nd) 299):

"A threat is made by a trustee to sell property to satisfy a claim of $12,500.00 and interest, the greater part of which has already been paid, and no question of bona fide purchaser is involved. That a court of equity will enjoin such a sale and such a breech of trust on the part of the trustee does not admit of question. *Wilksie on Mortgage Foreclosure,* Sec. 3945."

When the cause came back to the district court for trial, that court held that an assignment of a recognized demand for $11,965.00 upon a fund created for the purpose of improving Paramount Heights, which complainant contended was payment on account of the $12,500.00 note and $4,500.00 note, was "as collateral only and not as payment." With that finding this court agrees.

The paper appearing in evidence as the assignment in question bears date November 29, 1924, while the notes in question are dated December 1, 1924, and this court holds that it is absurd to contend "that the assignment was executed and accepted as part payment on a note

not then in existence." But is it *less absurd* for the district court to hold that the assignment was executed and accepted *as security* for a note *not then in existence?*

The assignment obviously is misdated, for the resolution relied upon by the defendants as authorizing it was adopted at a meeting "held at 4:00 P. M., December 3, 1924." (R 136.) The assignment may have been prepared on the day of its date, the day following the date of the building contract, but doubtless was not delivered until later. What Walker and the Mortgage Corporation regarded and treated as the assignment of the account, and what Walker assigned to the Mortgage Corporation is dated December 4, 1924 (R 130) and is a direction of the beneficiary of Trust No. 243 to the Bank of America, holding the fund, to pay Walker up to $11,-965.00. That was the effective paper.

What did Walker consider his interest in or his rights under the assignment and the account and *what character did he impress upon it?* He certainly accepted the assignment *as payment* to the extent at least of $4500.00 or more, for that sum was collected and *applied to the payment* of the $4500.00 note. So far it seems to have been *payment* and not mere *collateral security.* He might properly have applied the money upon the other note, and he intended the residue to be applied upon it. The assignment of this account to Roper (R 131) and the assignment to the Mortgage Corporation (R 130) are companion pieces.

There was no forclosure upon this account *as collateral;* the money was collected and paid *without waiting for default* on the note. The account was not *sold for default.*

Walker treated the assignment as *payment* on the $4500.00 note and this he did with the *consent of the Mortgage Company,* for the latter took the account subject to that application of $4500.00. How can they consistently contend now that it was *mere collateral* as to the *other note?* Complainant made no distinction—it was to apply on the $17,000.00. Was not the character of the assignment fixed for all purposes when it was applied as payment on the $4500.00 note, if not before?

Counsel for appellant in their brief give this correct definition of collateral security, from 11 *Corp. Juris,* 961:

"*Collateral Security*—Any property or right of action, as a bill of sale or stock certificate, which is given to secure the performance of a contract or the discharge of an obligation and as additional to the obligation of that contract, and which upon the performance of the latter *is to be surrendered* or discharged, a separate obligation attached to another contract to guarantee its payment * * *."

That Walker did not regard the assignment in question nor the account assigned as mere collateral is manifest from the fact that he immediately proceeded to use the fund *as payment,* and put it out of his power, upon the performance of the main obligation or otherwise or at any time, *to surrender* the assigned account. If it was collateral, then the assignor was entitled to have it surrendered, undiminished in value or amount by any act of the assignee, upon payment of the debt secured; or upon default of such payment, to have it sold and applied on the debt. Walker made either course impossible.

But whether the account be treated as payment or as security, some accounting should have been had, for it appears that at the time of the assignment to Walker, $1855.56 had been paid into the fund, and that up to March 14, 1927, $13,615.95 more came into the fund (R. 70-71) and this appears to have been subject to the assignment in question and under control of the defendants and out of control of the complainant. Doubtless the district court would have directed some accounting, if the assignment had not been regarded as purley collateral.

* * * *

When the amended bill was filed and when it was dismissed on motion, the amount for which the defendants threatened the sale of the land was about $13,000.00, but immediately upon dismissal $2,000.00 or more was added. As the bill prayed an accounting to ascertain what sum complainant justly owed, proffering to pay the same when ascertained, it was thought that such an accounting would be had and that the added claim, if made, would be disallowed or at least passed upon. As soon, however, as the court treated the claim as not before the court, complainant prepared the supplemental bill, which presented the matter, and submitted it to the court as soon as the presence and convenience of the judge permitted and at the time the main cause was submitted, and without intentional delay.

Upon the entering of the final decree the defendants advanced their demands another $4,000.00 and more.

* * * *

Upon restraining the sale pending the present appeal, this court exacted of the appellant, not an ordinary

injunction bond to answer damages, but a bond conditioned for the absolute payment of $2500.00 to the defendants on account of the debt, in event the decree appealed from should be affirmed. The affirmance of the decree puts that burden upon appellant and still leaves the defendants unrestrained and at liberty, so far as this court or the court below is concerned, to add to their previous demands further demands at their pleasure. It is left to their arbitrary will to say what is justly due, and what sum must be paid to prevent the sale.

It is respectfully submitted that the existing situation calls for some relief, which can only be had through a rehearing of the cause, and that for the reasons stated such rehearing should be awarded.

Respectfully submitted,

CAESAR A. ROBERTS,
MAYNARD F. STILES,
For Petitioner.